SUPREME COURT OF THE UNITED STATES

IN EQUITY.

No. ~~88~~ 14

THE INSURANCE CO. OF NORTH AMERICA,
APPELLANTS,

versus

THE HIBERNIA INSURANCE CO.,
APPELLEES.

O. B. SANSUM,
Solicitor for Appellees.

T. H. Thomason, Printer, New Orleans.

SUPREME COURT OF THE UNITED STATES.

In Equity.

No. 1[illegible].

THE INSURANCE CO. OF NORTH AMERICA,

Appellant,

vs.

THE [illegible] INSURANCE CO.,

Appellee.

[illegible]

SUPREME COURT OF THE UNITED STATES

IN EQUITY.

No. 138.

THE INSURANCE CO. OF NORTH AMERICA,
APPELLANTS,

versus

THE HIBERNIA INSURANCE CO.,
APPELLEES.

The controversy disclosed by this record grows out of certain re-insurances made by appellees for appellants.

One of the re-insurance policies (No. 268) was intended to attach in favor of appellants whenever, but not till all insurances made by appellants for their customers on any one vessel exceeded appellants' LINE. The policy (268) covered ship, cargo, freight and specie, every insurable thing, to an amount not exceeding $10,000, at and from and to all ports, excepting only the port of New Orleans, from which port it covered to $5000; but no risk *from* New Orleans was taken.

Shortly stated, it is a contract attaching at and from all ports on the face of the globe excepting New Or-

leans, whenever the insurances made by appellants aggregated a sum exceeding appellant's *line*. Or, in insurance parlance, it was a re-insurance on "EXCESS" (80).

Policy 277 is another re-insurance contract on merchandise and specie from certain specified ports, to-wit., Laguyra, Porto Cabello and Curacoa, to ports in the United States, to apply on the excess which appellants might insure by all their policies on vessel, freight, cargo or profits, including specie or treasure, exceeding $50,000.

Policy 296 is another re-insurance contract on whatever appellants might insure from port or ports in the East Indies to port or ports of advice for discharge in the United States, on the excess which appellants might insure on all their various policies over $50,000, to apply, *pro rata*, with all other re-insurance on the same excess, not exceeding $10,000.

Policy 297, precisely in all respects like that last mentioned except it covers from ports in the West Indies.

Policy 306 is like the last, except it attaches on cotton only at and from ports in the United States to Europe, on the excess of $70,000.

Policy 268 was made to Charles Platt, Jr., for account of whom it may concern.

A great many re-insurances were reported on it, and a great many demands for losses were sent by appellants to appellees, which were promptly paid *to appellants*.

Subsequently, while the business seemed to move

along quite harmoniously, applications were sent direct from appellants to appellees, for policies covering from ports in Central America (policy 277), and from ports in the East Indies (policy 296), and from ports in the West Indies (policy 297), and on cotton from ports in the United States (policy 306).

And the business progressed, but unmerciful disaster followed fast and followed faster, until appellees deemed it prudent to pause and look for the cause, which affected so distressingly their bank account.

To that end appellees inquired diligently of appellants as to the aggregate risk they had taken on certain vessels named, and as to the aggregate of re-insurance they had procured on the same. Answers to these inquiries disclosed the startling fact, that as to some of the vessels appellants had wholly re-insured, and as to others had re-insured them to an extent which clearly indicated a desire to leave as small a risk as possible upon appellant's shoulders.

So soon as appellees ascertained the fact mentioned, they gave the notice required by the several policies and broke away from a business which was bound to bring them ruin if they remained long enough in it.

This suit is brought to recover back the money thus paid in error; the Court below referred the case to a Master, who reported in favor of appellees for the sum of $27,986.79, with interest at 5 per cent. per annum from judicial demand, viz., Aug. 13th, 1884.

Exceptions were filed and overruled, and judgment was rendered March 12th, 1886; the Court adopted

the Master's report as the opinion of the Court, *word for word,* and from that judgment this appeal is taken.

The undisputed evidence shows, that, while policy 268 is on its face a contract between complainants and Charles Platt, Jr., nevertheless it was intended to re-insure the Insurance Company of North America only, on such risks only as that Company carried their line. It was made upon representations stated in a letter written by Mr. Charles Platt, Jr., which induced appellees to make the policy. The letter in which these representations appear was written by the authority and with the knowledge of defendants; but they take the position on this subject that they may appropriate all the benefits of that contract and get absolution from its burdens. They argue: It is a policy with Charles Platt, Jr. It cannot be enlarged or restricted by anything occurring anterior to or at the time it was made. That as soon as defendants asked Charles Platt, Jr., to reinsure them, on any vessel or voyage and he accepted their offer, appellees became bound, without regard to the representations mentioned.

There is no serious dispute as to the facts in the case, for they are drawn principally from appellants' books and records, and witnesses, whose interest and bias are with appellants. The issue between the parties is one of law rather than of fact; and, observe first, this policy covers from all ports excepting the port of New Orleans: and to all ports including the port of New Orleans; that it is a continuing contract

with the right to cancel it by giving twenty days' notice, and that notice of shipments shall be given as soon as they are known, and amounts of risks declared as soon as they shall be ascertained.

The facts hereinafter stated led to the making of this policy, to-wit:

Mr. Marshall J. Smith, of New Orleans, being in Philadelphia in the summer of 1880, there met Mr. Charles Platt, Jr., where they talked about re-insuring appellants. Mr. Smith conferred with appellees' officers on his return to New Orleans, and October 6th, 1880, wrote Mr. Platt as follows:

"Our Mr. Smith has returned home and begs to refer to his conversation with you in regard to re-insuring here *the excess lines* of the North America. We have consulted with the officers of the Hibernia Insurance Company, a branch of which Company is under our management, and we propose to take a proportion of the general re-insurance of the North America, excepting coastwise risks, from New York here, of which business at the present rates we believe the North America does little. The Hibernia will carry a line of $10,000 on all foreign business of the Company at all ports excepting New Orleans; from New Orleans the line must be limited to $5000, as the Hibernia often have a line from their customers, and they may unknowingly double on a vessel. The Hibernia will allow 25 per cent. rebate, and to you a brokerage of 5 per cent.; should you be able to arrange this, please notify us at once. The Hibernia Insurance Company

has a capital of $400,000 paid up, is conservative and we look upon it here as in every way first class for the amount of risk they will assume." To which Mr. Charles Platt, Jr., replied under date October 11th, 1880, as follows: "Your valued favor of the 6th inst. is received, and I note contents with care. The Insurance Company of North American, *through me, will* be glad to enter into the re-insurance arrangement with the Hibernia on the terms named. I enclose herewith a policy I had with the Home Insurance Company of Newark, N. J., which you can take a copy of on a Hibernia policy, making the sum insured $10,000. Please send me the policy, and I can begin at once. *Of course, all risks accepted by me will be such that the Insurance Company of North America carries their line on,* and all risks that are bound by me will be held by the Company, as it will not do to have any cancellations. Shall I report all risks to you or to the Hibernia Company direct? I see no reason why the arrangement should not prove a success, and I will do all I can to make it so. The most part of it will be grain and general cargo from Atlantic ports to Europe. Please return the Home policy."

A fundamental principle governing all parties to a contract is, each party must act in good faith; neither party ought to suppress any fact material to the subject matter; the party who has knowledge of anything material to the subject matter must disclose it, and a failure to do so is the suppression of a truth which vitiates the contract; nor can either party represent

anything, material to the subject matter, which is not true; if such representation be made, it is a misrepresentation and vitiates the contract.

The case of Sibbald vs. Hill, 2 Dows, P. C. 263, shows, the insured represented he had paid eight guineas per cent. to other insurers for insuring the risk; the evidence showed that he had paid to one fifteen, to another eighteen, and to another twenty-five guineas. The Court of Session declared this not a representation affecting the nature of the risk, but the House of Lords ordered the judgment to be set aside on the ground that every representation is fatal to a contract which is made under such circumstances, and in such a way as to gain the confidence of the other party and induce him to act where otherwise he would not.

Without going through the vast number of adjudged cases where concealment and misrepresentations vitiate contracts, the latest is the case of the Sun Mutual Insurance Company vs. the Ocean Insurance Company, 107 U. S., p. 485. The action was upon a contract of re-insurance. All the correspondence relating to the making of the policy and reporting the risk was in the case. The Ocean Insurance Company had re-insured their whole risk with the Sun Mutual without disclosing facts which were within their knowledge, and which would have enabled the Sun Mutual to know that the Ocean were shifting the whole risk to the shoulders of the Sun Mutual. The Ocean had

judgment in the court below, which was reversed, with an order to dismiss the libel. The Court said:

"In respect to the duty of disclosing all material facts, the case of re-insurance does not differ from that of an original insurance, The obligation in both cases are *uberrimæ fidei*. The duty of communication indeed is independent of the intention and is violated by the fact of concealment where there is no design to deceive. The exaction of information in some instances may be greater in a case of re-insurance than as between the parties to an original insurance. In the former the party seeking to shift the risk he has taken is bound to communicate his knowledge of the character of the original insured where such information would be likely to influence the judgment of an underwriter, while in the latter, the party, in the language of Bronson, J., in the case of the *New York Bowery Fire Insurance Co. vs. New York Fire Insurance Co.*, 17 Wend., N. Y., 359 and 367, is not bound, nor could it be expected that he should speak evil of himself. * * * This statement is sustained by the authorities cited: *Ely vs. Hallet*, 2 Caines, N. Y., 57; *Moses vs. Delaware Insurance Co.*, 1 Wash. 385—and, in our opinion, is a necessary deduction from the nature and spirit of the contract of insurance. It applies with peculiar force in the present case, as every sentence of the rule is a condemnation of the Ocean Insurance Co., in imposing upon the appellant the whole risk of the insurance without communicating its knowledge of the circumstances

which might have made the latter as unwilling to assume it, as they seem to have made the former unwilling to retain even a share of it. For these reasons, and without passing upon other questions discussed, the decree of the Circuit Court will be reversed and the cause remanded with directions to enter a decree dismissing the libel."

Mr. Marshall in his very able work on Insurance states: Every representation is to be presumed material where there is just reason to believe it either determined the underwriter to insure or influenced his estimate of the premium (*Marshall Insurance*, p. 449).

"The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter. It is not necessary that the representation should be directly as to the state or condition of the subject of the proposed insurance. It is enough that it reasonably did exert or might reasonably be presumed to have exerted an influence over the mind of the underwriter in determining to assume a responsibility, he would not otherwise have undertaken" (*Arnould Marine Insurance, 5th Ed., Maclachlan's Vol. 1, 526 and 527*).

It being settled law, that every representation which did exert or might reasonably be presumed to have exerted an influence over the mind of appellees inducing them to re-insure appellants is material, the most pertinent inquiry is, what representations, if any, were made?

Mr. Smith's letter to Mr. Platt begs to refer to his

conversation in regard to *re-insuring the excess lines* of the Insurance Company of *North America*, and we propose, writes Mr. Smith, to take a proportion of the general re-insurance of the North America. Mr. Platt, acting under authority from defendants, replied, "the Insurance Company of North America, through me, will be glad to enter into the re-insurance arrangement with the Hibernia. And he adds, "Of course all risks accepted by me will be such that the Insurance Company of North America carries their line on."

What meaning shall the law give to the sentence last quoted? The risks which the Hibernia Insurance Company are to re-insure, are those that the Insurance Company of North America carry their line on. The last clause of the sentence, namely, "carry their line on," refers to and means the sum or amount which the Insurance Company of North America will not re-insure. The word *carry* means not to re-insure. If it be stated, I carry my line, I do not re-insure my line is understood.

It follows, the representation in Mr. Charles Platt's letter must be construed to mean, the risks to be re-insured by the Hibernia are only those that the Insurance Company of North America carry their line on.

What was defendants' line? If they had none, the representation is a fraud.

The Hibernia's line, as stated in the policy, from all ports, excepting New Orleans, was $10,000; from that port it was $5000, and to all ports, excepting New Orleans, it was $10,000; to that port *no risk was taken*,

because to and from New Orleans they had insurances for their local customers. Appellants' assets are about twenty times greater than appellees'. Appellants' business extends to all the ports of the globe for nearly a century. The master examined their records and books, so far as they saw fit to show them. There is in evidence four applications from them to complainants, covering nearly all the ports of the globe. Two of them are for re-insurance from ports in the East Indies and the West Indies, in which they applied for and procured appellees' open policies, re-insuring vessel, freight, cargo, profits, specie and treasure, on any one vessel over $50,000, to apply *pro rata* with all other re-insurance on the same excess. Here is a clear admission that their line from the East Indies and the West Indies is $50,000. There is a similar application from them, for another open policy was made to them, re-insuring the same things from ports in Central America on any one vessel over $60,000; and there is a similar application from them upon which another open policy was made to them, re-insuring, on cotton from ports in the United States on any one vessel over $70,000. A large number of vessels from and to divers ports on the face of the globe show whenever appellants' policies on vessel, freight and cargo on any one reasonably good vessel exceeded $50,000 they re-insured the excess. In some cases they carried more than the sum named. Appellants' second Vice-President being called by appellees, testified on his cross-examination, "As I

said, there is no usual line; an amount of $50,000 which appears in many of our policies was arbitrarily decided upon for the reason that we had to make *a line of excess on which to re-insure. Fifty thousand dollars about represents what this Company would carry as a fair average on their whole business on each individual risk.*" This statement under oath is from a witness hostile to appellees. The master finds, as a fact, that the line usually carried by defendants, *i. e.*, not re-insured by them, was fifty thousand dollars by any one vessel. He states his conclusion as follows: "These facts lead me to believe respondent was to retain its usual line on all risks where it re-insured with complainants, and the risks complainants were to underwrite were only such as respondent retained its usual line on. The usual line of respondent, as appears from the evidence, was $50,000. It generally re-insured the excess of $50,000. This sum, therefore, was its usual line to be carried in all cases on all risks re-insured with complainant under the contracts."

Now here is a representation in Mr. Charles Platt's letter, which being construed reads: The risks to be re-insured are only those which the Insurance Company of North America carry their line on, and their line, as found from the evidence, is $50,000. That sum is their line. Appellants readily made their policy upon the assurance that appellees, being largely interested to the extent of their line in all the risks to be re-insured, would exercise the highest degree of cau-

tion and prudence in selecting them. No insurer ought to re-insure another whom there is reason to believe will have little or no interest in selecting the risk.

The business of an insurance company is to insure and retain, *i. e.* carry risks, in order to earn premiums. Re-insurance is sought for one of two reasons, either the risk taken is larger than the insurer's assets and business warrants, and therefore a part of it, the sum which exceeds the line is re-insured, or the insurer, for some reason best known to himself, wants to shift to another's shoulders the burden he has taken; but good faith demands the fact should be disclosed when he is getting off, in order to put the re-insurer on inquiry.

The Master, in his report, states: "At the very threshhold of negotiations for policy 268, complainant was told it was to re-insure those risks that the Insurance Company of North America carries its line on. In other words, the risks which respondent in its judgement deems safe enough for itself to carry its line on the complainant shall carry its stipulated line on—a stronger inducement could not have been held out to complainant for making the contract it did make."

But, appellants argue, policy 268 is a contract by appellees to Charles Platt, Jr., that it cannot be restricted or enlarged by parol testimony, and that no representations or concealments from him or by him can affect defendants.

When a contract is made to a person named, for the

benefit of a person not named, that person may adopt it and take all benefits accruing under it, provided there be upon the face of the contract, words indicating that the *contract* is for an undisclosed principal.

If appellants were seeking to enforce rights under policy 268, they could prove every fact tending to show it was made for their benefit. This is declared in the case of *Catlett vs. Pacific Ins. Co.*, 1 Wend. 561; and the same thing has been declared in Louisiana, in cases where the policy was as this is: "For account of whom it may concern." (*Bell vs. West. Nat. Ins. Co.*, 5 Rob. La., 423). The courts have said in all such cases, such evidence shows for whose benefit the policy was made, but it does not alter, vary, nor add to the written contract.

Appellants' right to bring a suit upon this policy in their own name, or in the name of Charles Platt, Jr., for their use, is absolute, If such a suit were brought could they be heard to say, that the representations and doings of Charles Platt, Jr., respecting the policy and the re-insurances made under it are inadmissible? Could they demand the benefits and advantages conferred by the contract and at the same time aver that the representations upon which it was made, or the facts which were suppressed, should not be received against them?

The Court's attention is directed to Charles Platt's testimony on this point. On the record, p. 215, depositions taken in Philadelphia, he testified: I wasn't allowed to take any direct business under that policy. My

transactions under that policy was simply confined to re-insurances for the Insurance Company of North America. On page 216 he testified: It was done in that way simply as a matter of convenience to the Insurance Company of North America. On page 231, he states: All defendants' reports concerning all their risks upon the open policies they held from the Hibernia, and all the business defendants had with complainants under policy 268 was transacted through me. On page 208, he testified: I received the letter of October 6th, 1880, from Marshall J. Smith & Co., and it is in my possession, and comparing the original with the copy it is correct. (All the letters written by the witness to Marshall J. Smith & Co. about the business are in evidence). On page 213 of his deposition he was asked, On your receiving Marshall J. Smith & Co.'s letter of October 6th, 1880, did you make known its contents to the Insurance Company of North America? He answered: I imagine I did. He was then asked: The letter you wrote October 11th, 1880, in which you say, the Insurance Company of North America will, through me, be glad to enter into the re-insurance arrangement with the Hibernia on the terms named, was that statement predicated upon any thing that had passed between yourself and the Insurance Company of North America? He answered: I certainly wouldn't say it on my own authority. This testimony was delivered in defendants' directors' room in their

building in Philadelphia, March 12th, 1885. All the defendants' officers were present, the witness' father, Mr. Charles Platt, and the witness' brother, Mr. William Platt, second Vice President, were present. The taking of depositions were concluded in the evening of the 13th, and not one word of testimony has been tendered to show what took place between appellants' officers, respecting what they said to the witness when he exhibited to them Smith's letter of October 6th, 1880, nor what was said by them to him, upon which he predicated his letter of October 13th. Both these letters were in evidence. They allowed the statements set forth in the letters to remain uncontradicted in any respect, and argue that the master had no evidence in the case tending to show that Mr. Charles Platt, Jr., acted for defendants! Appellant's President was called, but they never asked him a question on this subject. Their second Vice President, Mr. William Platt, was being examined as a witness, but they never asked him a question on the subject. They might have asked Mr. Charles Platt, Jr., what he did with Smith's letter; to whom he carried it, and what was said on the subject of procuring policy 268, but no question of the kind was propounded. They contented themselves with questions of this nature: "For whose benefit or interest was policy 268 made? Had the Insurance Company of North America anything to do with the policy or the benefits accruing therefrom? In what capacity did you act on policy 268? Is it true as charged in com-

plainants' bill that policy 268, though issued to you and in your name, was in reality issued to and for the benefit of the Insurance Company of North America?" These are mere samples of the questions propounded by defendants in their cross-examination to a witness, who is their President's son, and their second Vice President's brother, whom they authorized to write a letter which contains the most important link in these proceedings!

Appellants had no right to report a risk on which, for reasons known to themselves, they would not carry their line, and Mr. Charles Platt had no right to receive any such risk; neither the report of it nor the acceptance of it can affect appellees unless they accepted knowing that defendants would not carry their line, and this presents the question: Have appellees accepted risks and paid losses thereon, knowing that defendants had no right to offer the risks or to make the demands?

Upon this branch of the controversy, no information respecting any risk was ever given but what is to be seen on the face of the notices, and nothing appears upon them tending to suggest that appellants would not carry their line on any risk. The notices of risks by barks, Adele, Ocean, Budstikken, Yorkshire, L. E. Cann, Skerryvore, ships Adam M. Simpson and Matchless, read, "*upon merchandise.*" Notice of the risk by the Etimologia, read, "upon wheat." It cannot be argued that on either of these notices there is anything tending to show defendants would not carry

their line on the vessels named. Notice of the risk by the ship Obi, reads, "upon sugar, being excess over $25,000;" the notice of the risk by the bark Impi, reads, "upon wheat, excess over $30,000." Upon these notices there is nothing tending to show defendants had insured only wheat and sugar. The notice of the risk by the steamship Avlona, reads, "upon cargo excess over $25,000"—*non constat* appellants' policies were upon cargo only—for they were insuring the hulls of vessels, and carrying a line on them of $25,000, as appears by the testimony of their second Vice-President, Mr. W. A. Platt, they were insuring not only hulls and cargo, but freight-money, specie, treasure and profits. Appellees had no right to presume defendants, and Mr. Charles Platt, Jr., were conniving to shift to complainants' shoulders risks that appellants *would not* carry their line on.

Appellants' letter of March 10th, 1884, admits asking permission to reduce their line on the ship Tonawanda. This ship was reported January 27th, 1882, $10,000 from Mobile to Liverpool under policy 268. Their request shows they understood they were to carry their line or report their intention not to carry it—one confession is as potent as a thousand.

Appellees tried to get information as to the lines appellants carried, and, after much delay, obtained it; on receiving it, they cancelled all contracts.

The information was given reluctantly, for in answer to the first request, appellants replied: Such a thing is without precedent among our eastern companies.

Subsequently they sent a list, showing what they had carried on each vessel inquired about, and this information is the foundation of this suit. (See Exhibit X, 12.)

One of the extreme cases presented in this exhibit is the Bark Budstikken. Appellants reported this risk September 23d, 1882; October 24th, they received full advices of the amount they had insured for their customers, the amount being $19,309. They had previously requested re-insurances from several companies, limiting the amount to be re-insured by each, the aggregate whereof amounted to $20,000. But on November 20th, 1882, appellants knew their whole risk on this vessel was only $19,309, yet they re-insured as follows: People's, of New Orleans, $2500; Teutonia, $2000; New Orleans, $3750; Hope, of New Orleans, $1750; American, $1750; and appellants, $5000; in this way they re-insured not only their whole risk, but six hundred and ninety-one dollars beyond it. The bark must have been then inclosed in ice in the Gulf of St. Lawrence or on shore, for five days thereafter her total loss at Mount St. Louis, Quebec, was announced. Appellants' second Vice-President was asked: Then you kept no risk at all on that vessel, to which he replied: We wanted to, but could not. He was asked: Why did you make the re-insurance on November 20th, to the amount of $20,000, when you had less than $20,000 on the vessel, to which he gave no reply. Appellants' President, on the same subject, testified: "It was, I should say, an ac-

cidental thing; it was the intention of the Company to have carried its line on the Budstikken, but owing to the fact that the re-insurance was affected upon an amount which was reported open and which was afterwards closed at a very much less figure, the re-insurance policies practically absorbed the whole insurance. Certainly, personally, I would not have wished it, and I remember making the remark, that I not only regretted that it happened, but that I would not have had such a thing happen under any circumstances. It was a pure accident entirely." But Mr. William H. Platt states: The re-insurance on this vessel, other than that by the Hibernia, was made November 20th, 1882, and all the re-insurances were paid in full December 30, 1882, excepting the Hibernia's, and from them only, $4288.45. Explaining why appellees paid a smaller sum that the American, both being for the same amount, he said: We had the option of dividing up the short interest between any companies we choose, so we deducted it from the Hibernia, as our relations with them has always been most friendly.

Another extreme case is the Steamship Avlona, bound from the Mediterranean to Montreal. The notice of this risk bears date, October 18th, 1881, no amount of re-insurance being stated. Twelve days thereafter appellants' agent at Montreal telegraphed them: "Steamer Avlona, Cadiz, tenth, via Halifax; Montreal. Reported seventy-seven. Re-insured forty. *Seeking ten more in Boston.* Please try for five." The

day following the *New York Herald* published the fact that the Avlona had been towed into St. Johns, N. F., by the steamer Bristol, having suffered loss of her rudder and some of her cargo jettisoned. This is one of the risks where appellants did not carry their line.

From whom and when did the agent at Montreal get information that she was at Cadiz, October 10th? He certainly knew appellants' insurances on her amounted to $77,000. He procured $40,000 re-insurance, was seeking $10,000 more in Boston, and told them please try for $5000. Here was anxiety to get $15,000 more re-insurance on this vessel, while the compositors of the *New York Herald* were setting the type which would inform the world the ship *had been towed* into St. Johns in a damaged condition! But *seven weeks thereafter, namely, December 21st, 1881*, appellants put off on appellees $5000 of this risk without saying a word about the disaster which this ship had previously suffered. They had informed complainants on the face of the notice the risk will not exceed $5000; otherwise the full length of the $10,000 would have been run out to appellees, who were in blissful ignorance on the subject of broken down rudders, jettisoned cargoes, and St. Johns, N. F., as the Avlona's port of refuge.

The bark Adele, from Java to Montreal, is another extreme case. Appellants expected to insure for their customers on this vessel $114,000. She took on board sugar amounting to $47,392 and sailed for another port to finish her loading, but grounded before she

reached it, and incurred general average expenses, every dollar of which appellants collected from their re-insurers. February 15th appellants knew of the disaster, and on April 27th they re-insured $61,500, including appellees' $5000. What right had they to charge complainants with part of this general average loss, when they knew appellees' policy had not attached when it happened?

The ship Matchless, from Iloilo to Boston, is another extreme case, This vessel is reported under their policy from the East Indies to the United States, under which the re-insurance applies expressly on the excess of $50,000, and *pro rata* with all other re-insurance. Anticipating the risk on this ship at $140,000, appellants procured re-insurance aggregating $85,000. The ship was lost June 18th, 1883, and knowing they had only $123,488 at risk, they reduced the re-insurance to $73,488, leaving their line at $50,000; but they did not see fit to make any reduction on appellees' policy. They demanded of appellees the whole amount insured, while they reduced the Orient's, of New York, to $8228, whose limit on this risk was exactly what appellees' was—$10,000. Why reduce the re-insurances made by other re-insurers 27¾ per cent., and demand of appellees dollar for dollar?

The ship Adam M. Simpson stands exactly in the same position as the ship Matchless. Appellants anticipated a risk of over $140,000 on her, and procured re-insurance $92,500. The ship was lost January 2d, 1884; they pressed their claim upon complainants

February 14th, for the whole amount, offering to abate six per cent. per annum for prompt payment. It was not due for 60 days from the date it was presented. February 12th, defendants knew their whole risk on the ship did not exceed $91,344, and, to stand the loss of their line $50,000, there would be only $41,344 to receive from their re-insurers. They then apportioned this sum as follows: American Insurance Company, $1991 on their re-insurance of $5000; Salem Insurance Company, $1991 on their re-insurance of $5000; China Mutual, $7963 on their re-insurance of $20,000; Manufacturers' Insurance Company, $1991 on their re-insurance of $5000; Boylston Insurance Company, $2986 on their reinsurance of $7500; Ocean Insurance Company, $1991 on their re-insurance of $5000; Merchants' Insurance Company, $1991 on their re-insurance of $5000; Union Insurance Company, $1991 on their re-insurance of $5000; Boston Insurance Company, $7963 on the re-insurance of $20,000; Shoe and Leather Insurance Company, $2986 on their reinsurance of $7500; Insurance Company State of Pennsylvania, $2500 on their re-insurance of $2500, and appellees $5000 on appellees' reinsurance of $5000. By what rule of equity did they collect $5000 from appellees under a contract which provides that appellees' re-insurance shall be *pro rata* with all other re-insurance on the same excess, while they call the contributions of all other re-insurances, except the Insurance Company of the State of Pennsylvania, at the rate of 40 per cent. on the sum re-insured?

The case of *Traill vs. Baring*, 4 DeG., J. & S. 218, shows the plaintiffs re-insured £1000 on a life, the defendants representing they would retain £1000 of the risk, but subsequently they re-insured the whole of it, and an action was brought, after the death of the person insured, to compel the defendants to deliver up the re-insurance policy, that it might be cancelled. The Court allowed the prayer of the bill, but said, I desire in the first place, to absolve the defendant from all imputation of any intention of actual fraud; actual fraud has not been imputed at the bar.

Appellees respectfully and confidently submit there is not one word of evidence in the case tending to prove that they had any notice of appellants' intention not to carry their line on any ship or vessel.

On page 83 of appellants' argument, a large part of Mr. W. A. Platt's testimony is inserted. But every risk reported to appellees is in writing, and the master, in making his findings on the facts, was governed exclusively by the fact that no report of any risk gave appellees any information as to the amount that appellants had at risk on any vessel. In some instances the notices report re-insurance, say $10,000, "on cargo, excess of $40,000," or even a less amount; in other instances the notices report re-insurance on sugar, excess of $30,000. But appellees affirm that from such notices no one can understand that appellants had not insured more than their line.

Appellees pray the Court to affirm the judgment.

O. B. SANSUM,

Solicitor for Appellees.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 138.

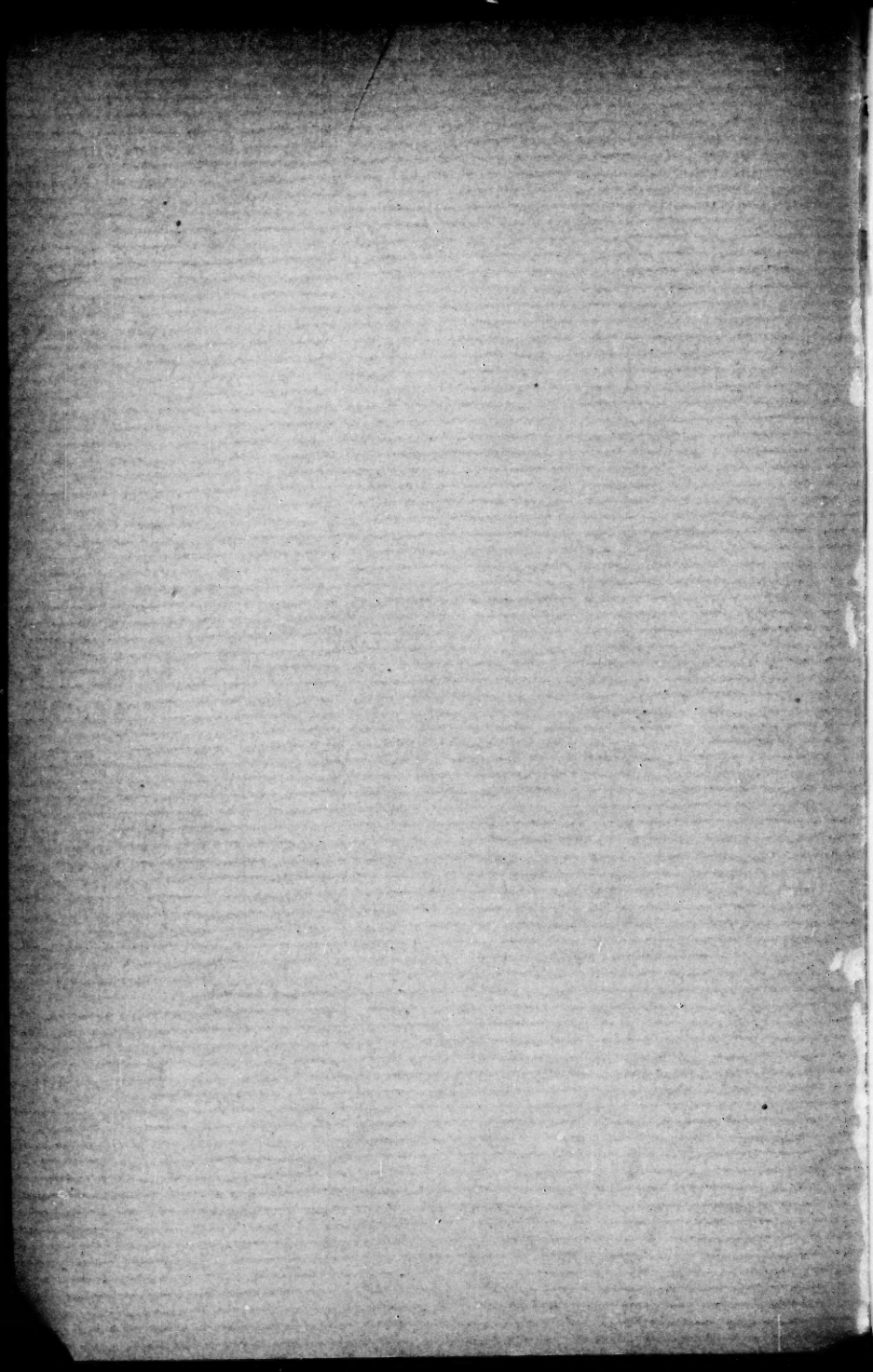
INSURANCE COMPANY OF NORTH AMERICA

vs.

THE HIBERNIA INSURANCE COMPANY OF NEW ORLEANS.

BRIEF FOR APPELLEE.

THOS. J. SEMMES,
Of Counsel for Appellee.



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BRIEF FOR APPELLEE.

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1. It is contended that policy No. 268 was not issued to or for the benefit of the North America Insurance Company. What are the facts?

That policy is dated 13th October, 1880, and declares that, "The Hibernia Insurance Company of New Orleans by this policy of insurance do make insurance and cause to be insured Charles Platt, jr., for *account of whom it may concern*, lost or not lost at and from ports in the United States and foreign ports, upon all kinds of lawful goods, merchandise, etc., laden or to be laden on the good steam or sail vessels," etc., (p. 77).

The indorsement on the policy limits it to $10,000 upon any one vessel from all ports, except from New Orleans, where the limit is to be $5,000, and provides

that it is not to cover any risk to New Orleans. It also provides that the policy is to be *continuous* until cancelled by either party giving twenty days' notice, but without prejudice to risks pending at the date of cancellation.

It also provides that notice of each shipment is to be given to Marshall J. Smith & Co., managers, as soon as known, and amounts declared as soon as ascertained.

These terms of insurance convey the idea that a permanent arrangement was contemplated with some one who was to be insured.

What were the circumstances which preceded and attended the issue of this policy? Conversation on the subject passed between Marshall J. Smith, the manager of the Hibernia Company, and Charles Platt, jr., in Philadelphia, who is a son of Charles Platt, the president of the North America Company, and a brother of William A. Platt, vice-president of that company. The business of Charles Platt, jr., was that of a general insurance agent in Philadelphia (p. 185), who was stimulated by the desire to make an arrangement between the two companies by which he could get a commission from the business (p. 182).

In the conversation between Charles Platt, jr., and Marshall J. Smith we are informed by Mr. Platt that "the arrangement proposed by him (Smith) was that I should arrange with the Insurance Company of North America to *accept through me re-insurances* in the Hibernia under an *open policy issued to me in my name.* He said he would go back to New Orleans—that is, Mr. Smith said that—and confer with the Hibernia and write me on the subject. Mr. Smith did go back, and the result was this letter of October 6, 1880, giving me instructions that the Hibernia Insurance Company would make such an arrangement by which they would issue to me a policy, which was afterward sent, No. 268, and confine their

lines to $10,000 *re-insurance of the Insurance Company* of North America. *I am not allowed to take any direct business under that policy.* My transaction under the policy was simply *confined to re-insurances* in the Insurance Company of North America (p. 183).

It is, therefore, apparent that the only arrangement contemplated was an arrangement between the two companies, and the only parties to the *re-insurances* intended to be made were the parties to this suit.

This conversation was followed by a letter from M. J. Smith & Co., written after the return of Mr. Smith to New Orleans, which I give in full.

"*October* 6, 1880.

"CHAS. PLATT, Jr., Esq., Philadelphia.

"DEAR SIR: Our Mr. Smith has returned home, and begs to refer to his conversation with you in regard to re-insuring here the excess lines of the North America. We have consulted with the officers of the Hibernia Insurance Company, '*a branch of which company is under our management*,' and we propose to take a proportion of the general re-insurance of the North America, excepting coastwise risks from New York *here*, of which business at the present rates we believe the North America does little.

"The Hibernia will carry a line of $10,000 on all foreign business of the company at all ports excepting New Orleans. From New Orleans the line must be limited to $5,000, as the Hibernia often have a line from their customers, and they may unknowingly double on a vessel. The Hibernia will allow 25 per cent. rebate and to you a brokerage of 5 per cent. Should you be able to arrange this, please notify us at once. The Hibernia Insurance Company has a capital of $400,000 paid up, is conservative, and we look upon it here as in every way first class for the amount of risk they will assume.

"Yours, truly,

"M. J. SMITH & Co."

The above letter elicited the following reply from Chas. Platt, jr.:

"Charles Platt, jr., Insurance, 331 Walnut street, Philadelphia.

"PHILADELPHIA, *October* 11, 1880.

"MARSHALL J. SMITH, Esq., New Orleans.

"DEAR SIR: Your valued favor of the 6th instant is received, and I note contents with care. The Insurance Company of North America, through me, will be glad to enter into the re-insurance arrangement with the 'Hibernia' on the terms named. I inclose herewith a policy I had with the 'Home' Insurance Company of Newark, N. J., which you can take a copy of on a 'Hibernia' policy, making the sum insured $10,000. Please send me the policy and I can begin at once. Of course all risks accepted by me will be such that the Insurance Company of North America carries their line on, and all the risks that are bound by me will be held by the company, as it will not do to have any cancellations. Shall I report all risks to you or the 'Hibernia' Company direct? I see no reason why the arrangement should not prove a success, and I will do all I can to make it so. The most part of it will be grain and general cargoes from Atlantic ports to Europe. Please return the Home policy.

"With many thanks and regards from Mr. Picolet and myself, I am, yours, very truly,

"CHARLES PLATT, JR."

This correspondence resulted in the issue of policy No. 268, dated 13th October, 1880. Its form was suggested by Charles Platt, jr. The word "re-insure" is not found in the policy. The correspondence and the anterior conversations show the arrangement was a "re-insurance" arrangement. The name of the Insurance Company of North America is not found in the policy, yet the conversations between Smith and Platt and the correspondence show that the North America Company was the only party concerned; that it was the only party to be

re-insured, and that no one else, not even Charles Platt, jr., could use the policy. He was the mere broker whose name was inserted in the policy in lieu of that of the North America Company as *a matter of convenience to that company.* So Platt, jr., testifies (p. 184).

Yet the North America Company in its answer, sworn to by its president, denies that policy No. 268 "was ever issued to *or for* them (said company) *in any manner*" (p. 13).

The contents of the correspondence between Charles Platt, jr., and Marshall J. Smith were communicated to the North America Company before the policy No. 268 was issued. The testimony of Charles Platt, jr., is as follows:

"Q. On your receipt of Marshall J. Smith & Co.'s letter of October 6, 1880, did you make known its contents to the Insurance Company of North America?

"A. I imagine I did.

"Q. The letter that you wrote of October 11, 1880, in which you say, 'the Insurance Company of North America, through me, will be glad to enter into the re-insurance arrangement with the Hibernia on the terms named,' was that statement made by you predicated upon anything that had passed between yourself and the Insurance Company of North America?

"A I certainly would not say it on my own authority."

An attempt was made on cross-examination to qualify and break the force of the admission contained in the foregoing extract of the testimony of Charles Platt, jr., but the effect produced on the mind by what was said on cross-examination is almost as painful as that caused by the statement of this witness that policy No. 268 was issued for his benefit, and not for the benefit of the Insurance Company of North America (p. 184). The only excuse for the witness is that he was expressing an opinion on a question of law.

The authorities establish beyond question, that in all cases where the policy is issued "for account of whom it may concern," parol evidence may be introduced to show for whose benefit the policy was made, and the beneficiary, though not named in the policy, may sue thereon.

Catlett *vs.* Insurance Company, 1 Wend., 561.
Bell *vs.* Insurance Co., 5 Rob., La., 423.
Hooper *vs.* Robinson, 98 U. S., 538; 12 Gray, 532.
Somes *vs.* Insurance Company, L. R., 5 P. C., 263.
Browning *vs.* Insurance Company.

It is not pretended that the representation contained in the letter of Charles Platt, jr., dated October 11, 1880, was not material. That letter says: "Of course all risks accepted by me will be such that the Insurance Company of North America carries their line on." Every representation is to be presumed material, which is of such a nature as would likely induce a fair and reasonable underwriter to take the risk, or to take it at a lower premium than he otherwise would. The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter. 1 Arnould Ins., 530 (fourth edition, 1887). And, in considering whether the representation is material, the question is, what the plaintiffs thought about it.

Trail *vs.* Baring, 4 DeG.; Jones & Smith, 330.

The usage prevails in New Orleans, that no company will take the risk of re-insuring another company, unless they are satisfied that the company re-insured is carrying its line, and insurance men regard the line that the re-insuring company carries as material, because they do not look into the risk at all, trusting entirely the re-insured company in that respect.

Prevost, 206.

The testimony of this witness is fully supported by that

of Mr. Fourchy and Mr. Chalaron (p. p. 208–211). Mr. Fourchy says that no sane underwriter would reinsure the whole risk of another company, and that he never heard of such a case, except when the re-insured company went into bankrupcy (p. 222).

The usage in New Orleans, as testified to by these witnesses, existed for many years, as may be seen in the case reported in 13 La. An. R., p. 246.

2. But it is contended that the representation contained in the letter of 11th October, 1880, is a promissory representation, and, therefore, not binding on the North America Company. No objection was made in the court below to the introduction of this letter in evidence, no motion to suppress it is found in the record, no bill of exceptions appears to have been taken, and no ruling of the court was asked as to its admissibility. So that question is eliminated. Having allowed the contemporaneous document to be introduced, is it not too late to object to its effect? But is a promissory representation of no avail?

Arnould, in his work on Marine Insurance, sixth edition, 1887, vol. 1, p. 521, says:

"*Positive* representations have been subdivided into (1) affirmative, (2) promissory; the former averring the actual existence of the fact to which it relates, the latter, that such fact shall or will thereafter exist."

This distinction, however, is one more of form than substance; as in fact most positive representations, even when in terms affirmative, in effect, are promissory. As where it is represented the vessel is neutral, or has a license to trade, or has a certain armament or a certain kind of cargo, the mere affirmation of these facts as existing at the time is unimportant. It is the implied promise that as far as depends on the assured, they shall be

and continue unchanged throughout the duration of the risk, which alone gives value to the representation. To take an instance in point: In the case of Pawson *vs.* Watson, the representation made by the broker in effecting a policy on a ship was in these words: "She mounts twelve guns and twenty men." Although affirmative in point of form, it is plain that this representation was promissory in its meaning; for when the policy was effected, the ship which, as appears by the report, did not sail for a month afterward, had not a single gun or man on board, so that the representation, unless construed to refer to a future event, was false when made. The whole judgment of Lord Mansfield plainly shows that he took it to be, what undoubtedly it was, not a mere assertion of the actual force of the vessel at the time, but a stipulation that she would sail with the armament described on the voyage insured. Had the representation just stated been thus expressed, "she is to (or she will) mount twelve guns and twenty men," it would have been an instance of a representation promissory in terms as well as in effect.

It is an important question whether there is any difference between an affirmative representation and a promissory representation as to the ground on which, if false, it will avoid the policy; in other words, whether the positive representation of a future fact, material to the risks, will just as much avoid the policy, in the absence of moral fraud, as the positive misrepresentation of a past, or existing fact, equally material."

After speaking of the distinction first taken by Lord Tenterden at *nisi prius* in Flinn *vs.* Tobin, 1 Mood & Malk., 367, Mr. Arnould proceeds thus:

"But this distinction, even when confined to the sole case of promissory representations is totally irreconcil-

able with principle or with express authority of the greatest weight. The principle on which the false affirmation of the actual or past existence of a material fact avoids the contract in cases where there is no moral fraud is, that the underwriter only engaged to be liable upon the faith that such fact existed; so that the falsity of the statement is the breach of a condition precedent that the contract should be free from misrepresentation. On principle there is no ground for the distinction, and it is also quite irreconcilable with authority. Instead of citing all the cases to show that the doctrine of the courts has been that such representation, although made in good faith, must be substantially complied with in order to sustain the policy, a single decision to this effect in the House of Lords, whilst it was presided over by Lord Eldon, may suffice. A policy on ship and goods from Nassau to the Clyde was effected on 18th June, 1814. On that occasion the broker showed the underwriters a letter dated 2d April, and received by the owners the day before the policy was effected, in which it was stated, '*The Brilliant*, the ship insured, will sail on the 1st of May.' In point of fact it turned out that the ship had sailed on 20th of April, and on 11th of May had been captured by an American privateer. These facts were wholly unknown to the parties by whom the representation was made; yet it was held that the policy was avoided by the misrepresentation. There is a difference, said Lord Eldon, between the representation of an expectation and the representation of a fact. The former is immaterial; but the latter avoids the policy if the fact misrepresented be material to the risk. * * * Accordingly, where a representation was made some time before the ship sailed, that she was to sail with convoy and a certain armament, so that the representation was both promissory in its terms and related to an actually future fact, Lord Ellenborough held, that as it had not been substantially complied with, it avoided the policy, though made with no moral fraud. * * * It may, therefore, safely be laid down as the conclusion to be derived from all the authorities that the positive representation of a future

fact material to the risk will, if false, avoid the policy, though it may not be morally fraudulent."

Mr. Arnould cites the following authorities:

Steel *vs.* Lacey, 3 Taunt., 285.
Feise *vs.* Parkinson, 4 Taunt., 639.
Edwards *vs.* Fortner, 1 Camp., 530.
Dennistown *vs.* Lillie, 3 Bligh P. C., 101.
Duer Insurance, vol. 2, 741–3 and 749–769.
Flynn *vs.* Headlam, 9 B. & C., 693–696.

Arnould says, that it seems Lord Tenterden on further reflection abandoned the distinction assumed by him in Flinn *vs.* Tobin.

Mr. Phillips, in his work on insurance, vol. 1, sec. 553, p. 293, says:

"That the preponderating weight of authority establishes, first, that a positive affirmative representation of material facts in respect to the future is, in effect, a stipulation that they shall be substantially as stated, and that the non-fulfilment of such a representation will defeat the policy if it occurs prior to or simultaneously with the commencement of the risk, or be a ground of forfeiture if afterward."

Mr. Duer says, in his work on insurance, vol. 2, pp. 657, 658:

"The distinction (between affirmative and promissory representations) was first made by Marshall, but it is clearly deducible from the cases, and although its accuracy has been recently impugned, it is sustained by an irresistible weight of authority. The objection to its propriety rests chiefly, if not entirely, on the erroneous supposition that it is only as fraudulent that a misrepresentation can affect the policy; a doctrine which, as already stated, the modern decisions have effectually overthrown. In truth, the majority of representations are

promissory, and many, and those the most usual and important, when affirmative in their terms, are promissory in their spirit and intent; that is, while they assert the present existence of the facts they embrace, they, imply a stipulation that the same facts shall continue to exist during the continuance of the risks. Thus, when a vessel is represented to be neutral, the meaning is not merely that such is the character of her present owner, but that no act shall be done to change or affect her neutrality during the voyage or period for which she is insured. So when it is represented that the vessel has a certain document, such as a license to trade, necessary to her safety on the voyage insured, the promise implied is the document shall continue on board during the voyage, and shall be used when necessary for her protection. So when it is stated that the vessel has a certain armament, or a cargo of a certain quantity or weight, it is a stipulation that the first shall not be diminished or the second increased or changed so as to increase the risks of the insured, and in those and all similar cases the mere affirmation of the existing fact is unimportant. It is the implied promise that there shall be no change to the prejudice of the insurer that alone gives value to the representation."

Parsons on Marine Insurance, vol. 1, p. 429, says:

"A representation of future facts may be only an *expectation*, or it may be a *promise;* an expectation that such a thing will happen, or a promise that it shall happen. When it amounts to this promise, we know no reason to doubt that it binds the assured."

Mr. Parsons draws a distinction between a representation as to future facts from one who has no power to make his words good, and one from a party who can make the fact conform to the representation. In the latter case he thinks, if the representation be not made good the policy is avoided.

I am aware that in Massachusetts every representation

as to a future fact is treated as a mere expectation, and therefore immaterial. The whole subject is discussed at length, and the authorities are reviewed by Chief-Justice Gray, in Kimball *vs.* The Ætna. Co., 9 Allen, 542.

3. It is further contended that policy No. 268 is not a contract of re-insurance on excess over the usual lines carried by the defendant.

The two letters above mentioned show that the proposed arrangement was an arrangement for re-insuring such excess.

The letter of October 6, written by Smith & Co., says:

"Our Mr. Smith has returned home, and begs to refer to his conversation with you in regard to *re-insuring here the excess lines of the North America.*"

The reply of 11th October, written by Charles Platt, jr., says:

"The Insurance Company of North America, through me, will be glad to enter into *the re-insurance arrangement* with the Hibernia on the terms stated. * * * Of course all risks accepted by me will be such that the Insurance Company of North America carries their line on," etc.

It was not necessary to describe the contract in policy No. 268 as a re-insurance.

McKensie *vs.* Whetworth, L. R., 10 Exch., 145.
Same case affirmed on appeal, 1 Exch. Div., 36.
Bowery Insurance Company *vs.* New York Insurance Company, 17 Wend., 362.

The dealings between the parties show that the policy was treated as a policy on excess. The indorsement on policy No. 268, reducing it from $10,000 to $5,000, under date July 1, 1883, is in these words: "From and after

this date this policy, No. 268 of the Hibernia Insurance Company of New Orleans, shall apply for $5,000 instead of $10,000, as heretofore on *same excess as expressed therein and subject to the same terms and conditions*" (p. 81). What excess is here referred to? The same excess intended to be insured by the policy when it was first issued, to wit, the excess over the line carried by the North America Company. The apologetic letter of William A. Platt, vice-president, dated 23d November, 1883, does not repudiate the complaints of the Hibernia Company in regard to the failure of the North America Company to carry its line, but enters into explanations on the assumption that the Hibernia Company's policy, was a policy on excess (p. 248). The same remark applies to the letter referring to the *Tonawanda* (p. 252). In that letter Charles Platt, president, says: "In the case of the *Tonawanda* the $10,000 line was *retained by special permission*," etc.

Opposite counsel in their brief (p. 64) controvert the construction placed on it by the master; they say the *Tonawanda* was insured under open policy No. 306. Where is the evidence of that fact? The statement furnished by them shows the vessel was insured under policy No. 268 (p. 32). The only insurance on the *Tonawanda* referred to in the evidence of Mr. Platt is that of 27th January, 1882, under policy No. 268 (p. 149). The policy No. 306 was not issued until 1st September, 1872 (p. 97). Platt SR/1264

It is therefore clear that policy No. 268 was purely a policy on excess. There can not be an excess unless there be a sum to which that excess relates. When the term excess is used we mean an amount over and above a named or fixed sum. It is contended that the North America Company was not bound to carry any line of insurance at all, or, at all events, no fixed line. Evidence is introduced to show that the North America Company varied its lines, and that it is usual for insurance com-

panies to do so, and that an agreement to carry a fixed line, under all circumstances, is unusual. All the other excess policies filed in the cause speak of an excess over a fixed sum, say, $50,000 or $60,000 or $70,000. But policy No. 268 is silent on the subject. The answer denies that the North America Company had any line of insurance; yet the letter of 11th October, 1880, written by Charles Platt, jr., says, in effect, the North America Company had a line; for all the risks to be accepted by him, he says, "will be such that the Insurance Company of North America carries their line on." President Platt tells us that "an amount of $50,000 which appears in many of our policies, was arbitrarily decided upon, for a reason that we had to make a line of excess of which to re-insure; $50,000 about represents what this company would carry, as a fair average on their whole business, on each individual risk, but that line varies very much at all times" (p. 168).

Mr. Fourchy, president of the Merchants' Insurance Company in New Orleans, says:

"Every company fixes for itself according to its capital or the boldness of its officers or the demand for business a certain line to be carried on its risks. This line varies according to the standing of the company or the wisdom of its officers. Our lines are from $5,000 to $10,000. Each company fixes its usual line. By looking at the books of a company you can easily find what their usual line is. * * The usual lines are made on its capital." He says the meaning of the word excess, according to the usages and customs prevailing, is "excess over the usual lines" (p. 210).

This question was put to him: "Supposing a company re-insuring a risk applies for re-insurance, but says nothing about excess or about its usual line, what is the un-

derstanding among insurance men?" His answer is: "That it is on the excess" (p. 210).

Mr. Chalaron, president of the Hope Insurance Company, says: "The custom is that whenever a company applies for re-insurance, unless they state that they are re-insuring their whole line, it is the understanding between the companies that they are insuring the excess of the line they habitually carry on such risks" (p. 211).

He further says that "the understanding or meaning of the word 'excess' is anything above the habitual or usual line that a company keeps or carries" (p. 211). Both of these gentlemen state that they never heard of a company re-insuring the whole amount without disclosing the fact (p. 212); and Mr. Fourchy says that if informed that the first insurer did not intend to carry any risk, he would not re-insure him at all (p. 211).

Mr. Sherrerd, president of the Pennsyvania Insurance Company, a witness for defendant, was asked: "May or may not a company, when it thinks advisable and in accordance with the customs of underwriters, re-insure its whole line or amount at risk?" (P. 278). He answered: "An insurance company may not, in accordance with the customs of underwriters, re-insure its whole line or amount at risk" (p. 280). Mr. Hand, president of the Delaware Company, says it may be done if the re-insurers are advised of the fact (p. 282).

This testimony accords with the views expressed by the court in Sun Insurance Company *vs.* Owen Insurance Company, 107 U. S., 485.

Besides, the customs in New Orleans, where the contract was made, are to be considered; for it has been held that a person who deals in a particular market must be taken to deal according to the customs of that market, and he who directs another to make a contract at a particular

place must be taken as intending that the contract may be made according to the usages of that place.

Bayliffen *vs.* Butterworth, Exch. R., 425.
Cobb *vs.* Insurance Company, 58 Maine, 326.
Parkhurst *vs.* Gloucester Co., 100 Mass., 305.

It is very clear that the correspondence between Smith & Co. and Charles Platt, jr., that is to say, the letters of 6th and 11th October, 1880, may be resorted to for the purpose of showing what was the subject of insurance and whether the contract was one of re-insurance. If that be so, and the court comes to the conclusion that the subject of the re-insurance was the excess of the usual line carried by the North America Company on vessel, cargo, freight and other interests susceptible of insurance, then the question of law as to promissory representations becomes immaterial. Moreover, if policy No. 268 is a policy on excess only over the usual lines carried by defendant, it is immaterial whether the re-insurances effected by the defendant were flat—that is to say, for specific amounts—or not, for the specific insurance itself would only apply to excess over the usual line carried by the defendant; it is that excess which would constitute the subject of insurance, and if the defendant did not carry its usual line there would be no excess of that line on which the specific insurance could attach.

4. It is further contended that the Hibernia Company has waived its right to object to the conduct of the North America Company in a certain class of cases where they did not carry their line of $50,000.

The alleged waiver is based on the form of the certificates issued in those cases, which, it is contended, gave notice to the Hibernia Company that the defendant was carrying less than $50,000 on the whole risk. Now,

what does excess mean? There is a form of excess application given on page 240, viz.:

"Re-insurance is wanted by the Insurance Company of North America for $—— on —— on board of the —— at and from ——, to apply to the excess which the said company may have on *all their various policies on vessel, freight, cargo or profits, including specie or treasure, over* $——," etc.

It is contended that the certificate of insurance issued under policy No. 268 in the case of the *Obi* gave notice to the Hibernia Company that the defendant was carrying on that vessel only a line of $25,000. That certificate reads as follows:

"Insurance has been made in the Hibernia Insurance Company of New Orleans, under open policy No. 268, for Insurance Company of North America, payable in case of loss to them for $10,000, upon sugar, being excess of $25,000, on board ship *Obi* at and from port or ports in the Philippine Islands to Boston, direct port" (p. 242).

In the case of the *Avlona* the language is, "for $—— *upon cargo*, excess over $25,000 not to exceed $5,000" (p. 243).

In the case of the *Impi* the language is, "upon wheat fi. p. a. e. c., excess over $30,000 not to exceed $5,000" (p. 245).

The following question was propounded to Presidents Comes, Motz, Sherrerd, Fuller and Hand—I copy the question propounded to President Hand:

"If an application for re-insurance is made, say by the North America to the Hibernia, for $10,000 upon sugar, being in excess of $25,000, on ship *Obi*, bound to Boston from the Philippine Islands in June, 1881, could or would you understand and believe or could the Hibernia understand and believe, that the North America carried or

intended to carry a risk, greater than $25,000 on said ship *Obi* at the time of the application? Would it be or not reasonable to think and infer from such an application, that the North America carried or intended to carry insurance on anything else on that voyage of the *Obi*, than the sugar mentioned in the application, and if the risk bore on a mixed cargo would it not be so stated in the application? Would it or not be reasonable for the Hibernia to infer and believe from such an application, that the North America carried or intended to carry $50,000 on said ship, as the Hibernia say they presumed and believed" (p. 278).

It is perceived this question was intended to elicit an opinion from the witness as to the construction and meaning of words used in a written instrument, and to bind the Hibernia Company to understand the document according to the interpretation of the witness. The question did not submit to the witness all the circumstances of the case. It omitted the important fact, that the Hibernia Company had only agreed to insure, as they contend, an excess over $50,000 on ship, cargo, freight, profits, etc.

The witness says:

"In answer to this interrogatory upon the facts stated therein, I am convinced that the inference would be that the Insurance Company of North America did not intend to carry a greater risk than $25,000 on the ship *Obi* at the time of the application. It would be an open question whether it would be reasonable to think or infer from the application, that the Insurance Company of North America carried, or intended to carry, insurance on anything else on the voyage named in this interrogatory than the sugar named in this application. It might cover sugar and hemp both. The risk that bore on a mixed cargo would not necessarily be stated in the application. The North America or the Delaware Mutual might have in-

sured on both sugar and hemp by the same vessel, and they would be at different rates of premium. One is more susceptible of damage than the other, by the vessel even, and a company might choose to re-insure the sugar and keep the hemp, or re-insure the hemp and keep the sugar. It does not necessarily follow that the risk, as stated in the application would bear on a mixed cargo. It would not be reasonable for the Hibernia Insurance Company to infer and believe from such an application that the Insurance Company of North America carried or intended to carry $50,000 on said ship *Obi*, distributed on the hull or other cargo of said ship as the Hibernia Insurance Company say they presumed and believed. It is usual, in effecting insurance on an excess of the amount intended to be carried by the original insurer, to state that this re-insurance is an excess of the amount retained on vessel, freight, cargo, and specie, but that such a re-insurance will apply to cargo only, so that the reserve line is not intended to be the reserve for all interests. How this particular ship was insured I know nothing about (p. 282).

When the witness admits "it might cover sugar and hemp both," he gives up the question. The same may be said of the application for insurance on cargo—excess over $25,000. The insurer might have risks on vessel, profits, or specie, which is not included in the word "cargo."

If testimony of this character were of value, and could influence the mind of the court, its force is entirely destroyed by the last sentence: "How this particular ship was insured I know nothing about."

But such evidence can not have the effect claimed for it. In the case of Kirkwook *vs.* Nisbett (3 Macq., H. L., 766), Lord Campbell said:

"But you can not ask a witness what is the meaning of a written document as is clearly sought to be done here. The letter is read over to the witness, or he is de-

sired to read it, and then he is asked what would the employer be entitled to expect? Of course he would be entitled to expect what the letter imports; and the question as to the contract between the parties depends upon the meaning of the words used. But the object of this question was clearly to lead the witness to put a construction upon the contract to govern the court and jury. It gives me great satisfaction to find that the learned judges in the court below were unanimous and were clearly of opinion that this question was not properly put."

A more complete account of this case is given in Lawson on Usages, p. 101. He cites it from Scotch App. Reports, 876, a book not accessible to me. But the question is, what did the Hibernia Company think or infer—not what others thought—for the waiver of a right or a stipulation in a contract must be made intentionally and with eyes open?

Mr. Prevost, the officer of the Hibernia Company entrusted with this business, when shown the certificates issued in the cases of the *Obi*, *Avlona*, and *Impi*, says there is nothing in them to indicate that the defendant intended to carry a line or risk less than $50,000 on those vessels (p. 202). He says that when he first received any of these notices, for instance, that of the *Obi*, on sugar, he went to Marshall J. Smith & Co.

"I showed them the application, and called their attention to it, and they said there might be freight, specie and other cargo on board the vessel besides the sugar."

"Q. You called their attention to the fact?

"A. Yes, sir.

"Q. You called when they first commenced?

"A. Yes, sir; when the first, second and third applications were received here.

"Q. Marshall J. Smith & Co. had the risks reported to them?

"A. Yes, sir.

"Q. I understand you did inquire of Mr. Smith?
"A. Yes, sir.
"Q. He was the agent?
"A. Yes, sir; he was the agent?
"Q. He stated what?
"A. He stated, 'this application only shows, so far as it goes, that they might have other cargo on board of the vessel.'
"Q. What did you say to him?
"A. I made the remark to him 'that it would be the sense of the policy,' and that if the Insurance Company of North America did not carry the full extent of $50,000 there was no policy, and he said those men would not carry less.
"Q. You will remember, when you were in Philadelphia, the testimony of Mr. Charles Platt, jr., and also of Mr. William A. Platt, second vice-president of the company, to the effect that risks had been reported to complainants of sums where defendants carried less than $50,000, and that complainants received those applications and never made any complaints. Now, I ask you whether you had, or complainants had, any notice whatsoever that defendants intended to carry less than $50,000 on any risk at any time?
"A. No, sir; never any notice received by us indicated it—not a single one.
"Q. No notice at all?
"A. No, sir" (p. 204).

This testimony is not assailed; the defendants never called on Marshall J. Smith, or any member of that firm, to qualify or impair it. This witness, when asked about sugar on the *Obi*, says: "No, sir; this simply covers on sugar; they could have had more on the freight, and more on the ship, and they could have had other things on her. She may have had also other cargo besides the sugar" (p. 204.)

He further says it was not until 1883 the complainants began to ascertain or conjecture that defendants were not

observing the terms of their policies. About May or June he began to feel uneasy, having on hand a great many applications from defendants; then he wrote for information. In November, 1883, he received further information, and then he cancelled the policies. The first information he got was when he made inquiries about the *Adele*, and two days after that he concluded to cancel the policies (p. 207). The first information was conveyed to him by Vice-President Platt's letter of 23d November, 1883, found at p. 248.

In speaking of the *Adele* he says:

"And I state further, with regard to the vessel, the *Adele* that defendants first stated that the amount retained on her by them was $28,000, and later on we ascertained that they did not carry $11,000, and later still we ascertained that they did not carry anything on her at all" (p. 207).

When asked about payment of losses to the defendants, he says:

"They generally paid themselves with the monthly returns. The money coming to us was generally eaten up" (p. 206).

It appears also that the defendant reduced its lines on the *Budstiken* so as to have no interest in that vessel. This is admitted in the brief of appellant (pp. 103, 104). The same admission is made as to the *Adele* (pp. 109, 110). The omission to carry any line on the *Budstiken* is called an accident, and the same omission as to the *Adele* is called a mistake. But when the omission was discovered, was it fair or just to call on the Hibernia to pay any portion of the loss?

In every case where the Hibernia Company seeks to recover losses paid by it under policy 268, the defendants knew, before they demanded payment, that they had no interest at risk or that the risk was less than $50,000.

All the losses reclaimed by the Hibernia Company are losses paid under policy No. 268, except three. The *Sherryvore* loss of $1,428 was paid under policy 297, which is an express re-insurance on the excess of $50,000; the *Matchless* and the *Adam Simpson* losses were paid under policy 296, which is also an express re-insurance policy on excess over $50,000. The amount of loss paid on account of the *Matchless* was $1,261.67, and that paid on account of the *Adam Simpson* was $2,705.19.

5. It is contended that Charles Platt, jr., was the agent of the Hibernia Company in procuring re-insurances from it for the North America Company. The payment of a commission to him by the underwriter did not create the agency.

Denny *vs.* Insurance Company, 83 New York, 171.
Mellen *vs.* Insurance Company, 17 New York, 609.

The fact is that the Hibernia Company sold insurance to the North America Company through Charles Platt, jr., broker.

The master has stated the circumstances which, in his opinion, show that Charles Platt, jr., acted throughout as broker of the North America Company in procuring insurance for it from the Hibernia Company; so that extended argument on the point is not required. If the policy 268 belonged to Charles Platt, jr., and was a contract with him alone, as the appellant insists on, how is it possible he could be the agent of the Hibernia Company, with whom he contracted?

6. Unless the report of the master as to the facts in the case is clearly erroneous, it should be confirmed. No authority is needed in support of this proposition.

Respectfully submitted.

THOS. J. SEMMES,
Of Counsel for Appellee.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 138.

INSURANCE COMPANY OF NORTH AMERICA,
APPELLANT,

vs.

THE HIBERNIA INSURANCE COMPANY OF NEW ORLEANS, APPELLEE.

SUPPLEMENTAL BRIEF OF APPELLEE.

1. The court is requested to bear in mind that none of the applications for re-insurance were transmitted to the Hibernia Company, they were filled out and sent to Charles Platt, jr., who forwarded a certificate to the Hibernia Company, stating that insurance had been made in the Hibernia Insurance Company, under policy No. 268, for Insurance Company of North America. The only knowledge which the Hibernia Company had was that derived from the certificate sent to it.

Therefore, when the Platts testify that the Hibernia Company at all times accepted, without objection, risks from the defendants, on various excesses below $50,000, and proceed

to give a long list of such excess insurances (p. 173), they mean that Charles Platt, jr., accepted such applications, and they persistently throughout their evidence insist and swear, that Charles Platt, jr., accepted such risks as the agent of the Hibernia Company, by virtue of the authority derived from the policy 268, issued to him, which they say was his policy and not the policy of the North America Company.

The only notice which the Hibernia Company had of any insurance whatever is that contained in the certificates sent to it by Charles Platt, jr. None of these certificates contain the word "excess," except in the three cases already alluded to, namely, the "Obi," "$10,000 on sugar, being the excess of $25,000;" the "Avlona," "upon cargo, excess over $25,000, not to exceed $5,000;" the "Impi," "upon wheat," excess over $30,000, not to exceed $5,000" (pp. 242, 243, and 245).

The case of the "Peruvian," testified to by Chares Platt, jr., as an insurance on an excess of $30,000, April 8, 1882, (p. 186), was not an insurance under policy No. 268. The papers relating to this case were called for by complainants (at page 187), and are found at pages 241, 242.

The claim made in this suit is based on re-insurance of the "Peruvian," under policy No. 268, on 20th November, 1882 (p. 166).

Charles Platt, jr., in his testimony, intimates, if not expressly, at least by implication, that the excess over $30,000 on merchandise on board the "Peruvian," 8th April, 1882, from Portland to Liverpool, was a re-insurance under policy No. 268. This is not the fact. The "Peruvian" risk, under policy No. 268, is dated November 20, 1882, from Montreal to Liverpool. (See list of insurances furnished by appellant, p. 38).

The "Peruvian" risk of 8th April, 1882, from Portland

to Liverpool, could not have been insured under policy No. 306, because it was not issued until 1st September, 1882, nor under the West India policy No. 297, nor under the East India No. 296, nor under the La Guayra and Curacoa policy No. 277, and, therefore, it must have been a special contract, as the papers show it to be.

2. The character of policy No. 268. That it was an open policy, I presume is not denied. It was so termed in all the certificates and notices sent to the Hibernia Company (pp. 242–7). That it was intended for the *exclusive* use of the North America Company, that Charles Platt, jr., never had and could have no insurable interest under the policy, and that it was a re-insurance policy, are facts established by the evidence. Though the Platts swear, and although the answer avers, that the policy was not issued for the benefit of the North America, the fact is otherwise; and the only excuse for the witnesses is that they express what they conceive to be a legitimate legal deduction. The truth is, the policy was issued for the sole benefit of the North America Company; that is to say, that company alone could avail itself of the policy to protect any insurable interest it might have which was embraced within its terms. Under this open policy the Hibernia Company was bound by any risk, within the terms of the policy, to which the North America Company chose to *apply it*. Mr. William A. Platt tells us that under open policies the company issuing them is *bound to accept* all vessels, unless it can prove that, at the time of taking on board the cargo insured, the vessels are unseaworthy or in a condition unfit to take the same (pp. 154 and 168). Under this open policy, No. 268, the North America Company was insured against loss on goods laden on any vessel, steam or sail, at and from ports in the United States and foreign ports." It embraced vessels going from

any port in the world to any other port, except to the port of New Orleans. The policy was to be continuous until terminated by notice. The amount at risk is fixed in the policy. The only act to be done by the insured was to give notice of the shipment as soon as known; in other words, to apply the policy—to use the policy. The mere notice of the shipment fixed the liability of the insurers. No premium is mentioned in the policy, because it was a re-insurance, and, therefore, the re-insurer was to be paid the same rate which the insured company charged its customer. For the same reason, a clause which is inserted in all original insurance policies in the United States is not to be found in policy No. 268, and the omission of that clause supports our view of the nature and character of the policy.

The following question was propounded to Mr. W. A. Platt:

"Q. Do not all policies of insurance on hulls made in this country contain a printed clause warranting that the vessels insured shall not use ports in the British North American provinces north of Halifax, except in the Bay of Fundy, except between August 15 and May 15, unless a special application and an agreement to that effect be made on each voyage?"

"A. Yes, sir; they all contain that clause, or something similar in character."

He goes on to explain that it is a well-known fact that the trade in the Gulf of St. Lawrence is a dangerous one.

When, therefore, the counsel in their brief (p. 5) say that "Charles Platt, jr., acting for the Hibernia, *passed upon these applications*, and in cases where he accepted the risk entered the particulars thereof on his books, and forthwith forwarded a certificate of the fact to Marshall J. Smith & Co." I submit the statement is argumentative; it is a deduction which counsel make, and that it

is an erroneous deduction. The certificates sent to the Hibernia were the mere *notices of shipment* which the North America Company, through its broker, Charles Platt, jr., sent to the Hibernia Company, as required by the terms of policy No. 268. Charles Platt, jr., *passed upon nothing* for the Hibernia Company; no such function was delegated to him; the policy fixed all the terms of insurance. The notice or certificate when delivered amounted to an application of the policy to the risk specified in the notice or certificate, and the insured having the right to apply the policy the Hibernia Company then became bound as re-insurer of the shipment mentioned in the notice. Charles Platt, jr., entered the particulars on his books because it was his duty to do so for the protection of his customer—the North America Company. The entries on his books were not made in the interest of the Hibernia Company. That company had possession of the certificates or notices sent them by Charles Platt, jr., and they constituted the evidence of the extent to which policy No. 268 had been used by the North America Company through Charles Platt, jr. If the risk, under policy No. 268, did not attach *eo instanti*, that the North America Company had at risk on any one vessel more than $50,000, it certainly attached as soon as the North America Company applied that policy to a particular shipment, and the act of making the application of the policy is the act of the insured, and not of the insurer.

The evidence shows that all the re-insurance business of the North America Company with the Hibernia Company was done through Charles Platt, jr. Was he also the agent of the Hibernia Company as to transactions insured under open policies 277, 296, 297, and 306? Those policies were direct contracts entered into between the two companies. Yet all the applications under them

were made through Charles Platt, jr. The truth is, the North America Company made no discrimination between policy 268 and the other policies, and all the business was transacted by the North America Company, managed by the father and brother (p. 194) of Charles Platt, jr., with the Hibernia Company, through him, the purpose being, as is easily seen, to give him a brokerage.

Mr. William A. Platt, in answer to the question "*To whom* did you apply when you applied to Charles Platt, jr.," says "we applied to him for re-insurance in the Hibernia Insurance Company, *but did not know what policy to put it under*, unless it was re-insurance under open policies, which specifically state the voyages which were covered" (p. 192).

If that be so, then, when Charles Platt, jr., applied any risk to policy No. 268, he acted as the agent of the insured, and in giving notice of such application to the Hibernia Company he did so as agent of the North America Company.

To show the temper of the witness, William A. Platt, he actually swears that his company never reported a re-insurance risk in the following cases: "Obi," "Budstiken," "Etimologia," "Yorkshire," "Adele," "Avlona," "Ocean," "Impi," "Peruvian" (p. 199). His statements were objected to because they were conclusions drawn from facts, for there is no doubt the certificates in all these cases were sent to the Hibernia Company by Charles Platt, jr. The anxiety to make Charles Platt, jr., agent of the Hibernia Company is to fix it with notice of the various insurances on excesses below $50,000, for it is manifest that Charles Platt, jr., knew that the North America Company, was making, through him, with the Hibernia Company, insurances on excesses less than $50,000, and he concealed the fact from the Hibernia Company. Such concealment was at least a fraud on his part, for he was act-

ing in violation of his promise contained in the letter of 11th October, 1880, in which he stated that no risks would be accepted by him, except such on which the North America *carries its line.* The word carry means not to re-insure. If it be stated, I carry my line, it means I bear the burden of the risk up to that line. I do not shift it to other shoulders. I do not re-insure that line. I do not re-insure at all until the amount at risk exceeds that line. The officers of the company were aware of the correspondence between Smith & Co. and Charles Platt, jr. The proposition of Smith & Co., in their letter of 6th October, 1880, is a proposition to *re-insure the excess lines of the North America.* The brief of counsel admits that this proposition was laid before the officers of the North America Company, and that "they agreed to give the Hibernia a share of *re-insurance business in the manner proposed*" (pp. 43–44 of the brief of appellant).

Therefore, when Charles Platt, jr., accepted risks where the line of the North America was less than $50,000 (supposing him to be the agent of the Hibernia Company, for the purpose of the argument), he knew that he was violating his duty and his promise to his principal. When accepting risks on which the North America Company did not carry its line he concealed this violation of duty from his principal, and the officers of the North America Company also knew that he had no authority to take risks, except on the excess over their line, as stated in the proposition submitted to them. Can they, under such circumstances, insist on the rule, that notice to the agent is notice to the principal?

The true view, however, is that Charles Platt, jr., was the agent of the insured for whom he procured insurance. This is the view of the master.

Respectfully submitted.

THOS. J. SEMMES,
Counsel for Appellee.